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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1501

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS, McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Petitioners,

against

JAMES H. TULLY, JR., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, the plaintiffs-appellants below, pray that a writ of certiorari be issued to review the judgment of the

United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States District Judge Foley for the Northern District of New York is set forth in the Appendix hereto. The opinion of Circuit Judges Mulligan, Meskill and Palmieri of the United States Court of Appeals for the Second Circuit, which affirmed the order of Judge Foley is set forth in the Appendix hereto.

JURISDICTIONAL STATEMENT

The order of the Court of Appeals herein is dated May 4, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners are retired Police Officers, formerly having served with the Police Department of the City of New York. While employed as such Police Officers they were required to and did contribute to the New York City Police Department Pension Fund. At retirement each of the petitioners had completed the requisite number of years of service entitling them to receive a pension from the Police Department Pension Fund, in which petitioners have vested contractual rights, the benefits of which may not be diminished or impaired by the City or State of New York, or any agencies or departments thereof [Article 5, Section 7, New York State Constitution, set forth at page 6 hereof]. It was held below, however, that the petitioners have no vested rights in their pensions and that their present complaint is devoid of merit, a decision pre-

sumably based on prior case law finding that pension rights, unless incorporated into a collective bargaining or insurance contract, whether or not an employee contributes thereto.

The issues raised in this petition for review by this Court of the adjudication below are the following:

1. Whether the provisions of Section 40(e) and 210 through 216 of the New York Retirement and Social Security Laws (hereinafter the "statutes" and set forth at pages 7-14 hereof) deprive petitioners of their vested contractual rights and are therefore unconstitutional because such state statutory provisions impair the contractual rights of petitioners in and to the Police Department Pension Fund in violation of Article I, Section X(1) of the United States Constitution.

2. Whether the statutes constitute an unconstitutional deprivation of

the liberty and property of petitioners in that the application of such statutes restrict the liberty of petitioners to engage in gainful employment with the State or City of New York without surrender or diminution of their duly earned and vested property rights, to wit, the pensions due and owing them by the Police Department Pension Fund.

3. Whether the forfeiture and diminution of the statutes deny to petitioners the same rights and protections afforded to other citizens of the State of New York, preventing petitioners from participating in the New York State Employees' Retirement System and thereby denying to them and their beneificiaries entitlement to the death insurance benefits, benefits of accidental death, ordinary disability retirement protection and accidental disability reitrement protection as provided to other persons performing duties

identical to those performed by petitioners as Excise Tax Investigators for the State of New York, thus denying to petitioners the equal protection of the law.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Article I, Section X(1):

> "No State shall...pass any... Law impairing the Obligation of Contracts,..."

II. United States Constitution, Amendment XIV, Section 1:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III. New York State Constitution, Article 5, Section 7:

> "[Membership in retirement systems; benefits not to be diminished nor impaired]. After July first, nineteen hundred forty, membership in any pension or retirement system of the state

or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

IV. New York State Retirement and Social Security Law, Section 40(e):

e. Any person who is or may be entitled to benefits by any other law providing for pensions and annuities for civil service employees, wholly or partly at the expense of the state or of a political subdivision thereof, shall not be a member. This provision, however, shall not:

1. Affect the membership of any person who legally is a member of the retirement system on July first, nineteen hundred forty-eight.

2. Exclude from membership any person who is or may become a member pursuant to paragraph two of subdivision c of this section.

3. Exclude from membership any person paid a salary from two or more sources, each of which entitles him to membership in a retirement system.

4. Exclude from membership any person holding office pursuant to appointment by the governor by and with the advice and consent of the senate, who at the time of such appointment would otherwise be entitled to a retirement allowance wholly or partly at the expense of the state or of a political subdivision thereof.

5. Exclude from membership any person who is or may become eligible for old-age and survivors insurance benefits pursuant to the provisions of this article except where his position was or is excluded from eligibility for membership in this retirement system in order to extend old-age and survivors insurance coverage to it and such eligibility shall not have been restored.

V. New York State Retirement and Social Security Law, Article 7, Sections 210-216:

ARTICLE 7—RE-EMPLOYMENT IN PUBLIC SERVICE OF RETIRED PUBLIC EMPLOYEES

Sec.

210. Definitions.
211. Employment of retired persons without diminution of retirement allowance.
212. Employment of low-income retired persons.
213. Membership in retirement system or service credit not allowed for employment under this article.
214. Continuation of employment privilege of certain retired persons.
215. Effective period.
216. Constitutional convention delegates and employees.

Historical Note

Article added L.1964, c. 803, § 1, eff. July 1, 1964.

§ 210. Definitions

As used in this article:

a. The term "retired person" means a retired member of a retirement system or pension plan administered by the state or any of its political subdivisions who is receiving a retirement allowance for other than physical disability.

b. The term "retirement allowance" means the total amount payable to a retired person, whether in the form of pension or annuity, or both, from a retirement system or systems or pension plan or plans administered by the state or any of its political subdivisions.

c. The term "supplemental retirement payment" means the supplemental pension payment or supplemental retirement allowance payable pursuant to article four or article six of this chapter, or section B20–44.1 or chapter forty-nine, title D, of the administrative code of the city of New York, or any other state or local law providing for similar supplemental pension payments or supplemental retirement allowances.

d. The term "final salary" means the maximum salary or compensation which the retired person currently would be receiving in the position from which he was last retired if he had not retired. If such position has been abolished, the appropriate authority or officer prescribed in paragraph (a) of subdivision two of section two hundred eleven of this chapter shall determine, on the basis of the salary or compensation currently paid to persons in similar or comparable positions by the employer from whose service such retired person last retired, the maximum amount of salary or compensation which such retired person currently would be receiving in such position.

e. The term "public service" means the service of the state or any political division thereof, including a special district, district corporation, school district, board of cooperative educational services or county vocational education and extension board, or the service of a public benefit corporation or public authority created by or pursuant to laws of the state of New York, or the service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its political subdivisions.

f. The term "former employer" means the state or a political subdivision, public corporation, school district, board of cooperative educational services, county vocational education and extension board, or an agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its civil divisions, which directly paid the salary or compensation of a retired person at any time during the two years immediately preceding his retirement.

§ 211. Employment of retired persons without diminution of retirement allowance

1. Notwithstanding the provisions of sections one hundred one, two hundred twelve and four hundred one of this chapter or section five hundred three of the education law, or the provisions of any local law or charter, a retired person may be employed and earn compensation in a position or positions in the public service, without any effect on his status as retired and without suspension or diminution of his retirement allowance subject to one of the following: (a) His total compensation in such position or positions in any calendar year, including compensation earned under other provisions of this article, shall not exceed the multiple of five hundred dollars next higher than the difference between (1) the sum of his annual retirement allowance computed

without optional modification plus annual supplemental retirement payments, if any, and (2) the salary on which his retirement allowance is based or his final salary, whichever is greater; or (b) The position in which he is employed is not a position in the service of a former employer.

2. (a) No retired person may be employed in a position in public service pursuant to subdivision one hereof except upon approval of

(1) the state civil service commission; or

(2) the commissioner of education if such person is to be employed in the unclassified service of a school district other than the city of New York, a board of cooperative educational services or a county vocational education and extension board; or

(3) the municipal civil service commission of the city of New York if such person is to be employed in a position in the service of the city of New York or in the classified service in the board of education or board of higher education of such city; or

(4) the superintendent of schools of the city of New York if such person is to be employed in the unclassified service under the board of education of the city of New York; or

(5) the board of higher education of the city of New York if such person is to be employed in the unclassified service under the board of higher education of the city of New York; or

(6) the chancellor of state university if such person is to be employed in the unclassified service of the state university of New York, or in the professional service at the state colleges of agriculture, home economics, veterinary medicine or industrial and labor relations, the state agricultural experiment station at Geneva or any other institution or agency under the management and control of Cornell university as representative of the board of trustees of state university of New York, or at the state college of ceramics under the management and control of Alfred university as representative of the board of trustees of state university of New York or in the unclassified service of a community college other than those in the city of New York.

(b) Such approval may be granted only on the written request of the prospective employer of such retired person, which request shall state detailed reasons therefor related to the standards set forth herein, and on a finding, on evidence satisfactory to the appropriate officer or authority specified in paragraph (a),

(1) that the retired person is duly qualified, competent and physically fit for performance of the duties of the position in which he is to be employed;

(2) that there is need for his services in such position;

(3) if he will earn more than one thousand dollars in one year, including compensation earned in such position under other provisions of this article, that there are not readily available for recruitment persons qualified to perform the duties of such position; and

(4) that his employment is in the best interests of the government service. Such approvals may be granted for periods not exceeding two years each. The authority or officer specified in paragraph (a), upon approving employment of a retired person under this section, shall certify such approval to the retirement system or pension plan from which such person is receiving a retirement allowance.

3. If a retired person employed under this section earns in such employment in any calendar year an amount in excess of the maximum earnings allowed under subdivision one of this section, his retirement allowance and supplemental retirement payments shall be suspended until the total amount so suspended equals the amount of such excess.

4. A retired person who returns to public service on or after January first, nineteen hundred seventy-four, as a consultant shall be subject to the limitations applicable to a reemployed retiree as specified in this section or in any other provision of law.

5. An officer, commission or board specified in paragraph (a) of subdivision two of this section which has approved the employment of any retired person is hereby authorized to require such retired person and the department head or other appointing authority under whose jurisdiction such retired person is employed to furnish at any time information concerning the employment and earnings of such retired person. It shall be the duty of such retired person and such department head or other

appointing authority to co-operate fully in furnishing such requested information. Such officer, commission or board may rescind approval granted for the employment of a retired person upon finding that such approval was obtained by deception or misrepresentation of any material fact, or that such retired person is serving in a position or engaged in duties substantially different from the position or duties for which his employment was approved, or that such employment does not otherwise conform with the requirements of this section, or that such retired person or the department head or other appointing authority under whose jurisdiction he is employed has failed to co-operate fully in furnishing requested information concerning the employment and earnings of such retired person.

6. Any request for approval of the employment of a retired person under this section, including the reasons stated therefor, and the findings and determination on such request shall be a public record open for inspection in the office of the officer, commission or board making such findings and determination as specified in paragraph (a) of subdivision two of this section.

7. The provisions of this section shall not be construed to authorize the employment of any person in any position in the civil service except in compliance with requirements of the civil service law and rules applicable to such employment.

8. Each officer, commission or board specified in paragraph (a) of subdivision two of this section may adopt appropriate regulations, procedures and forms for implementation of the provisions of this section. Such regulations may authorize employment of a retired person, without prior approval, but pending application for approval under this section, in situations of unforeseen and immediate need.

§ 212. Employment of retired persons

Notwithstanding the provisions of sections one hundred one, two hundred eleven or four hundred one of this chapter or of section five hundred three of the education law, or the provisions of any local law or charter, any retired person may continue as retired and, without loss, suspension or diminution of his retirement, allowance, earn in a position or positions in public service in any calendar year an amount not exceeding twenty-four hundred dollars, provided such retired person em-

ployed under this section duly executes and files with the retirement system from which he is receiving a retirement allowance a statement that he elects to have the provisions of this section apply to him. A statement of election executed and filed pursuant to this section may be withdrawn by a retired person at any time by a statement similarly executed and filed.

§ 212. Employment of retired persons [Eff. July 1, 1976]

Notwithstanding the provisions of sections one hundred one, two hundred eleven or four hundred one of this chapter or of section five hundred three of the education law, or the provisions of any local law or charter, any retired person may continue as retired and, without loss, suspension or diminution of his retirement, allowance, earn in a position or positions in public service in any calendar year an amount not exceeding twenty-five hundred twenty dollars provided such retired person employed under this section duly executes and files with the retirement system from which he is receiving a retirement allowance a statement that he elects to have the provisions of this section apply to him. A statement of election executed and filed pursuant to this section may be withdrawn by a retired person at any time by a statement similarly executed and filed.

§ 213. Membership in retirement system or service credit not allowed for employment under this article

a. The provisions of any local law or charter notwithstanding, no retired person employed in public service pursuant to the provisions of this article shall be required or permitted to become a member of any retirement system or pension plan administered by the state or any of its political subdivisions.

b. Member service credit may not be purchased or granted in any retirement system or pension plan administered by the state or any of its political subdivisions for any period of employment in public service authorized under the provisions of this article.

§ 214. Continuation of employment privilege of certain retired persons

Notwithstanding any provision of this article, a retired person employed prior to July first, nineteen hundred sixty-four, under the provisions of subdivision f of section one hundred one of the retirement and social security law, or subdivision two of section one hundred fifty of the civil service law, or section one hundred fifty-one of the civil service law, or section 9.13 of the mental hygiene law, or section five hundred eleven-b of the education law, or section B20–48.1 of the administrative code of the city of New York, may be similarly employed during the effective period of this article subject to the same conditions and limitations as were applicable to his employment under the respective provisions under which he was employed prior to July first, nineteen hundred sixty-four.

§ 215. Effective period

The privilege granted by this article to retired persons to continue as such and earn compensation in positions in public service shall remain in full force and effect until December thirty-first, nineteen hundred seventy-four.

§ 216. Constitutional convention delegates and employees

a. Notwithstanding anything to the contrary contained in this article or any other section of this chapter or any other provision of any general or local law, a member retired from any public pension system of the state, elected as a delegate of the convention to revise and amend the constitution of the state in the year nineteen hundred sixty-seven, or serving as an employee of such convention may serve and earn compensation in such position without any effect on his status as such retired member and without suspension or diminution of his retirement allowance.

b. Member service credit may not be purchased or granted in any retirement system or pension plan administered by the state or any of its political subdivisions for any period of service in the capacity prescribed by subdivision a.

Added L.1966, c. 827, § 3, eff. July 28, 1966.

STATEMENT OF THE CASE

Petitioners are retired Police Officers of the Police Department, City of New York. While employed as Patrolman, they were required to and did contribute to the New York City Police Department Pension Fund. The Police Pension Fund is a pension system which is separate and apart from the New York City Employees' Retirement System. Membership therein is limited exclusively to the Uniformed Members of the New York City Police Department. The New York City Police Department Pension Fund is neither maintained, sponsored or subsidized by the State of New York nor by defendant, the New York State Employees' Retirement System.

Each petitioner served the requisite number of years as policemen with the City of New York so as to entitle them to receive service retirement pensions from the

Police Department Pension Fund. Upon the retirement of petitioners they began to receive the pension payments due and owing to them in accordance with the conditions and benefits of employment with the Police Department of the City of New York.

Subsequent to the retirement of petitioners, the New York State Civil Service Commission held an open competitive examination for the position of Excise Tax Investigator, New York State Department of Taxation and Finance. The Civil Service announcement for said examination provided "candidates must have seven years of full-time paid experience in law enforcement or investigative work in a governmental police agency dealing with the investigation of criminal activities." As former policemen, petitioners were eligible to compete in said examination, and the announcement did not state that retired pensioners would be required on or after appoint-

ment to waive their pensions and would be ineligible to join and become members of the New York State Employees' Retirement System. All of the petitioners filed applications to compete in the written examination and disclosed their prior employment as policemen with the City of New York and their present status as retired service pensioners. Petitioners were graded qualified, were permitted to compete in the written examinations, and passed the written tests, thereby being placed on the eligible list. Thereafter, appellants were certified from said eligible list and were appointed Excise Tax Investigators for the State of New York.

As Excise Tax Investigators, Petitioners are Law Enforcement Officers, carrying firearms and making arrests. They search vehicles carrying contraband cigarettes into the State of New York, execute search

warrants, and, as Peace Officers, are engaged in hazardous work.

After completion by the petitioners of the required probationary period of employment and acquisition of tenure as competitive civil service employees, petitioners requested to join and become members of the New York State Employees' Retirement System. The Director of Personnel of the New York State Department of Taxation and Finance denied such request on the basis of the prohibition contained in Section 40(e) of the New York Retirement and Social Security Law, although such provision clearly conflicted with Article 5, Section 7 of the Constitution of the State of New York. Furthermore, although appellants were tenured civil service employees they were then advised that if they desired to remain in their competitively achieved positions as Excise Tax Investigators they

would be required to waive their rights to their police pension. Compelled to make a "no-win" decision, petitioners executed waivers, which were prepared by the appropriate New York State Agency, under protest and without waiver of their rights in respect thereto.

Petitioners are thus effectively prohibited from joining and becoming members of the New York State Employees' Retirement System, thereby denying to them and their beneficiaries the death insurance benefits, accidental death benefits, ordinary disability retirement, and accidental disability retirement for injuries sustained in the line-of-duty, and further denying to them rights and benefits equivalent to those of their fellow officers.

Sections 40(e), 210, 211, 212, 213, 214, 215 and 216 of the New York State Retirement and Social Security Law, which respondents have invoked against petitioners

are not applicable to persons receiving pension benefits from the United States Government or from any state or municipality outside the State of New York. Should such a pensioner become a New York State employee he would be permitted to join and become a member of the New York State Employees' Retirement System.

Petitioners maintain that due to such statutory provisions, they are being discriminated against and deprived of property rights related to job benefits and equal treatment under the law of the State of New York. Petitioners contend that such statutory provisions are unconstitutional inasmuch as they operate to deprive petitioners of property rights, to wit: their vested contractual right to a pension, the right to engage in employment on equal terms with fellow employees similarly situated, and the right of equal protection under the laws. (United States Constitution, Amendment XIV, Section 1).

Jurisdiction in the United States District Court for the Southern District of New York, the court of first instance herein, was found pursuant to 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§1331, 1361, 1391, 1343(3), (4), as petitioners sought to enjoin and have declared unconstitutional under 28 U.S.C. §§2201, 2202, the New York Statutes hereinabove set forth. After filing and service of process in the Southern District of New York, the matter was transferred to the Northern District of New York by stipulation and the endorsement of Judge Werker of the Southern District of New York.

The application herein for a three-judge court was made pursuant to 28 U.S.C. §§ 2281, 2284 to restrain state officials and state agencies from the enforcement, operation and execution of state statutes contrary to the Constitution of the United States, and

in such application a detailed discussion of the merits is not required. It was not incumbent upon the petitioners to convince the court below that the state statutes under challenge are constitutionally offensive. Where the issues raised by petitioners are not "essentially fictitious", "wholly insubstantial" or "obviously frivolous or without merit", the request for a three-judge court should be granted [Goosby v. Osser, 409 U.S. 512, 518 (1973)].

Judge Foley, in the District Court below, concluded that government pensions granted by statute and not incorporated into a collective bargaining or insurance contract, including those to which an employee contributes, are not vested property rights and thus may constitutionally be given, withheld, distributed, reduced, modified and otherwise conditioned as the government, in its discretion

sees fit.

The Second Circuit Court of Appeals affirmed the decision of the District Court for the Northern District on the opinion of Judge Foley below.

REASONS FOR GRANTING THE WRIT

I. The decision below should be reviewed because it failed to consider the important question of the impairment of the contractual right of the petitioners as granted to them by the Constitution of the State of New York [Article V, Section 7] and aborgated by the Department of Taxation and Finance of the State of New York in its application of the New York State Retirement and Social Security Law to petitioners.

Article V, Section 7 of the New York State Constitution expressly provides that membership in any pension or retirement system of the state or of a civil division

thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired [Sgaglione v. Levitt, et al., 37 N.Y. 2d 507, 375 N.Y.S. 2d 79 (1975)]. Article I, Section X, Clause 1 of the Constitution of the United States provides that "No State shall pass any...law impairing the obligation of contracts...", and this is in fact the effect of the New York State statutory provisions relevant herein. Significantly, in the decisions cited in the opinion of the District Court, the act of the Legislature was merely statutory, and there was not present any state constitutional provision, as in the instant case, which sanctified petitioners' pensions on a constitutional level under the umbrella of a contractual relationship. The New York Courts have consistently invalidated any attempt to either circumvent or emasculate the sanctity of this constitutional provision which mandates

that membership in a public retirement system be deemed a contractual relationship vesting benefits in the participants which may not be diminished, impaired, reduced or withheld [see Donner v. New York City Employees' Retirement System, 33 N.Y. 2d 413, 353 N.Y.S. 2d 428 (1974); Kranker v. Levitt, 30 N.Y. 2d 574, 330 N.Y.S. 2d 791 (1972); Kleinfeldt v. New York City Employees' Retirement System, 36 N.Y. 2d 95, 365 N.Y.S. 2d 500 (1975); and Matter of Ayman v. Teachers' Retirement Board, 9 N.Y. 2d 119, 211 N.Y.S. 2d 198 (1961)].

II. The decision below left open the question of whether petitioners are accorded equal protection under the laws of the State of New York by being required to continue employment with the State of New York under terms and conditions different from that of state employees similarly situated, all due to the fact that petitioners are entitled to certain benefits and contractual

rights by virtue of their service in the Police Department of the City of New York. The court below, in stating that the pensions herein are not vested rights is thus in contradiction to the provisions of the Constitution of the State of New York. Civil service employees devote a lifetime of service to the State or a municipality before they become eligible for their service pensions. To hold that petitioners, who also contributed from their salaries to their pension, have no vested right thereto is in violation of the clear direction of the New York State Constitution, and by its operation violates the provisions of the United States Constitution by effectively denying equal protection under the law to petitioners (Amendment XIV, Section 1).

By requiring the petitioners to undertake state civil service employment, for which they competed in an open examination under specific rules and regulations promulgated by the State, under terms depriving them of

certain death and disability benefits available to other employees similarly situated, and employed as Excise Tax Investigators with the State of New York, Department of Taxation and Finance, the State of New York denies to these petitioners equal protection under the law. As stated in Harper, et al. v. Virginia Board of Elections, 383 U.S. 663 (1966):

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined (citing cases)."

III. The question of the validity of the State statutes and contractual obligations of the State of New York in the instant case is of far-reaching importance to all state and municipal service retirees, whether or not presently employed, and to all state and municipal agencies in the State of New

York. The decision below effectively allows petitioners to be deprived of their property rights in and to the benefits due them as a condition of their employment by the State of New York without a full hearing on the merits of their application to the courts to determine if, in fact, they have been deprived of such property rights, such question being a matter of first impression and of great public interest. The issues raised by petitioners herein are neither whimsical, frivolous, fictitious or unconstitutional. In fact, they pose substantial questions of violation of provisions of the United States Constitution regarding equal protection, deprivation of property and impairment of contract rights which require the grant of the relief requested herein.

CONCLUSION

For the reasons set forth above,

it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Memorandum-Decision and Order
Appealed From.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGAN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Plaintiffs,

-against-

JAMES H. TULLY, JR., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Defendants.

75-CV-270

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JAMES T. FOLEY, D.J.

Memorandum.

MEMORANDUM-DECISION and ORDER

Thirty-one Excise Tax Investigators of the New York State Department of Taxation and Finance commenced this action in the United States District Court for the Southern District of New York, pursuant to 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. §§ 1331, 1361, 1391, 1343(3)(4), seeking to have enjoined and declared unconstitutional under 28 U.S.C. §§ 2201, 2202, certain New York State Statutes, specifically, Sections 40(e), and Article 7, [§§ 211 through 216] of the New York State Retirement and Social Security Law as well as to obtain money damages for alleged injuries these laws have caused them. This case, after its filing and service of process in the Southern District of New York, was transferred to this Northern District of New York, after informal hearing with District Judge Henry F. Werker, which resulted in a stipulation of the attorney for the plaintiffs and an Assistant Attorney General for Attorney General Louis J. Lefkowitz, Attorney for the defendants, with the endorsement thereon of Judge Werker on May 1, 1975, transferring the action to this District Court.

All the plaintiffs were policemen of the City of New York, stationed in Manhattan at the World Trade Center, and are now retired from that employment. At the present time they are employed as New York State Excise Tax Investigators in and around the New York City area. The plaintiffs, according to the complaint and submissions herein, are retired from the New York City police force with the requisite years that entitled them to receive, as they are presently, a pension from New York City. After their respective

Memorandum.

retirements all the plaintiffs took a civil service examination and met other legal requirements to be appointed to their present jobs as State Excise Tax Investigators. Both in the complaint, and by motion heard on October 6, 1975, plaintiffs request the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The defendants filed a motion to dismiss the complaint on the pleadings pursuant to Fed. R. Civ. P. 12(c) on October 3, 1975, made returnable October 20, 1975. For the convenience of the parties, however, both of these motions were argued in advance and heard by the Court at the October 6, 1975, motion day in Albany. Since defendants had not filed their answer in this action until October 22, 1975, the pleadings were not complete at the time of their single motion to dismiss the complaint on the pleadings, so this motion will be considered as one pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. 5 Wright & Miller, Fed. Prac. & Pro. Civil: §§ 1355-57 and 1367-69. Lastly, by Stipulation and Agreement, it was ordered by me on October 23, 1975, that the New York City Corporation Counsel be allowed to appear amicus curiae since issues relating to the New York City Police Pension Fund were present, and an amicus curiae brief has been filed by that office in support of the motion to dismiss the complaint.

The challenges made to the New York State Retirement and Social Security Law, with the exception of § 216 which has no discernible relevance to the claims made here, are basically twofold. First, under Sections 211 to 215 and 40(e) of the N.Y. Retirement and Social Security Law, a person who is retired from public employ-

ment with the State of New York or any political subdivision thereof may not become a member of or receive credit toward any other state or other political subdivision retirement system [§ 213], including the "New York State Employees' Retirement System" [§ 10 et seq. and 40(e)] and are thereby also excluded from any Accidental Disability Retirement under this system [§ 63].

Secondly, a retired public employee of the state or any of its political subdivisions who becomes reemployed by the state or any of its political subdivisions, with exceptions not relevant here, and earns an amount greater than that fixed by various formulae of these statutes [it is implicit that all of the plaintiffs here have "excesses" over the excepted minimum] shall have his retirement allowance and supplemental retirement payments suspended "until the total amount so suspended equals the amount of such excess." N.Y. Retirement and Social Security Law, Section 211 (3). Thus, the plaintiffs have been requested by the State of New York pursuant to their employment as Excise Tax Investigators under § 211 to waive the New York City Pensions which they are presently receiving. Several plaintiffs did sign such waivers indicating thereon that their consent was under protest and without waiver of the right to court action challenging this waiver. See Complaint Schedule "D"; Affidavit of John Grogan, ¶6 (filed Sept. 24, 1975). At this juncture it is particularly worthy of note that Section 1117 of the New York City Charter provides that the taxpayer portion of any city pension will be suspended and the payments forfeited for the time the retired city employee shall hold and receive compensation in excess of $1,800.00 while employed by the State, the City, or another

municipality of the State. The retiree shall continue to receive the annuity portion of his retirement allowance. Amicus Curiae, Memo of Law, p. 3. It is essentially on this section that the City of New York intervenes as amicus curiae, yet curiously plaintiffs strongly disavow that Section 1117 has anything to do with this lawsuit and expressly state that the Charter Section is not being challenged herein. See Plaintiffs' Memo. of Law, Point II at p. 3. (Received Oct. 14, 1975). In a similarly curious vein, the State of New York claims that this controversy is controlled by Section 150 of the New York Civil Service Law, which also provides for the suspension and forfeiture of a pension from the state or any political subdivision should the retiree be reemployed by the state or a political subdivision. However, Section 150 of the New York Civil Service Law seems to be of little relevance here because it expressly defers to the provisions of Sections 211 and 212 of the New York Retirement and Social Security Law as preeminently controlling. Plaintiffs, although attacking a substantial number of state statutes, do not challenge the constitutionality of Section 150 of the New York Civil Service Law. In their view, it was expressly stated by defendants that the request to waive New York City pension benefits was made pursuant to Section 211 of the New York Retirement and Social Security Law. See Complaint Schedule "D"; See Plaintiffs' Memo of Law, p. 4 (received October 14, 1975). While the effects, adverse from plaintiffs' point of view, of these statutes are evident in conditioning their present employment on waiving their city pensions, it should equally be noted that it is by virtue of the certification procedure of Section 211(2) of the New York Retire-

ment and Social Security Law that they were able to be considered and eventually obtain their current jobs.

The two motions presently before the Court, by the plaintiffs for a three-judge court and by the defendants to dismiss the complaint, are often, in my judgment, two sides of the same coin. Both motions raise the question whether the complaint, when its factual allegations are taken as true as they must be, raises a substantial federal question to sustain the alleged jurisdiction. With slight semantical differences, both the motion to dismiss and the motion for a three-judge court entail a similar search for a threshold level of substantiality in the claim articulated or any which can reasonably be inferred from the complaint, to wit: this claim must surpass the level of being "essentially fictitious", "wholly insubstantial" or "obviously frivolous or without merit," in the language of the leading precedent, Goosby v. Osser, 409 U.S. 512 (1973). See Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 100 (1974).

Difficult questions of application are presented by these standards for all levels of federal courts. Adding to the inherent difficulty in utilizing this judicially created search for minimal substantiality -- an extremely broad standard -- federal courts have been cautioned to apply it in a restrictive fashion. Gonzalez v. Automatic Employees Credit Union, supra, 419 U.S. at 97-98; Nieves v. Oswald, 477 F.2d 1109, 1115 (2d Cir. 1973). Thus, the three-judge court procedure has been described as a "plague" to all three levels of the federal judicial system [see Galvan v. Levine, 490 F.2d 1255, 1258-59 (2d Cir. 1973)] because it creates 'many problems 'so complex as to be virtually beyond belief.'"

Memorandum.

Nieves v. Oswald, supra, 477 F.2d at 1110. However, in all the mist in the many judicial writings on the subject, there is provided an objective standard of some certainty to evaluate the level of substantiality of the claims presented for three-judge composition:

> A three-judge court must be convened unless the claim is "wholly insubstantial," "obviously without merit," or if "its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject."
>
> Finnerty v. Cowen, 508 F.2d 979, 985 (2d Cir. 1974); see Goosby v. Osser, supra, 409 U.S. at 518-522.

Perhaps a much simpler and interesting test for jurisdiction might be the formula suggested by Mr. Justice Rehnquist, to wit: [where] "it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face." See Hagans v. Lavine, 415 U.S. 528, 564 (1974)(Rehnquist, J. dissenting).

Fortunately, there is much less uncertainty and vagueness in that portion of the standard which allows a previous decision of the Supreme Court or Court of Appeals, Second Circuit, to foreclose the subject. Nieves v. Oswald, 477 F.2d at 1112, supra. And, while it is doubtful that decisions by the highest state tribunal could provide such precedent on the federal substantiality issue, they nonetheless must be regarded as authoritative on any related questions of state law involved in the federal constitutional challenge. Higginsbotham v. City of Baton Rouge, La., 306 U.S. 535, 538-39 (1939); Perry v. St. Pierre, 518 F.2d 184, 186 (2d Cir. 1975); Agur v. Wilson, 498 F.2d 961, 965 (2d Cir. 1974), cert. denied, 419 U.S. 1072 (1974); 227 Book Center, Inc. v. Codd, 381 F. Supp. 1111, 1115-16 n.11 (S.D.N.Y. 1974).

Memorandum.

Independent research on the issues and supporting arguments presented by the instant complaint has uncovered considerable precedent which to my mind leaves no doubt as to the lack of federal merit and substance in the challenges made by the plaintiffs herein to the various statutes. On the basis of these previous decisions and their implicit foreclosure of the merits of the instant action, the motion for a three-judge court is denied, and it follows that the complaint must also be dismissed for failure to state a claim upon which relief can be granted.

In a line of unbroken decisions, the United States Supreme Court has made it clear that government pensions granted by statute and not incorporated into a collective bargaining or insurance contract, including those to which an employee contributes, are not vested property rights and they may constitutionally be given, withheld, distributed, reduced, modified and otherwise conditioned as the government, in its lawful discretion, sees fit. Lynch v. United States, 292 U.S. 571 (1934); Frisbie v. United States, 157 U.S. 160, 39 L.Ed. 657 (1895); Pennie v. Reis, 132 U.S. 464; 33 L.Ed.426(1889); United States ex rel. Burnett v. Teller, 107 U.S. 64, 27 L.Ed. 352 (1883); United States v. Hall, 98 U.S. 343, 25 L. Ed. 180 (1879); Walton v. Cotton, 60 U.S. (19 How.) 355, 15 L.Ed. 658 (1857); see also Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir. 1972), cert. denied, 409 U.S. 949 (1972); Nordstrom v. United States, 342 F.2d 55 (Ct. Cl. 1965); Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960); Rafferty v. United States, 210 F.2d 934 (3rd Cir. 1954); Abbott v. Morgenthau, 93 F.2d 242 (D.C. Cir. 1937), cert. denied, 303 U.S. 638 (1938); In Re Goodwin, 57 F.2d 31 (6th Cir. 1932); In Re Hoag, 227 F. 478 (S.D.N.Y. 1915).

Memorandum.

In evaluating the specific claims being made by plaintiffs here, I find that the challenged statutes are under these settled principles neither unconstitutional nor unreasonable. In terms of plaintiffs' first claim, it is unequivocally appropriate under the Constitution for the State of New York, on behalf of itself and its political subdivisions, to refuse retired public employees, who already receive one pension, from entering into yet another public retirement system, namely, the New York State Public Employees' Retirement system. This proscription against New York public employees acquiring double pensions has been the policy in the law of both federal and state jurisdictions long before the plaintiffs commenced their employment as New York City policemen. Indeed, in United States ex rel. Burnett v. Teller, supra, the Supreme Court approved the removal of one of the double pensions after it had been awarded to the relator:

> The right of the relator to double pensions, if he ever had such right, has been effectually cut off . . .
>
> It was competent for Congress to pass this Act. No pensioner has a vested legal right to his pension.
>
> Id., 107 U.S. at 67; 27 L.Ed. at 354.

A similar holding was made by the Court of Appeals for the District of Columbia in Abbott v. Morgenthau, supra, which approved congressional disallowance of dual gratuities:

> Congress said he could not enjoy both gratuities. It must be borne in mind that Felley had no vested interest or rights in the pension money. . . . Congress could annex whatever conditions it pleased to the gratuity . . .
>
> Id., 93 F.2d at 245.

Memorandum.

In my judgment, the claim of plaintiffs to a denial of property without due process for the statutory refusal under the New York Retirement and Social Security Law §40(e) and §213 to allow entry into a second public retirement system under this clear judicial reasoning and conclusion states an insubstantial federal claim foreclosed by previous decisions of the Supreme Court.

The remaining claim made by plaintiffs is that their acceptance of their new jobs as State Tax Investigators cannot be preconditioned on the waiver of their New York City pensions pursuant to Article 7 of the New York Retirement and Social Security Law because they were previously acquired independent to their present state employment. This claim is grounded on the legal theory that their New York City pensions are vested rights due to the contributions made by plaintiffs to the pension fund. This contention needs little discussion because it was also the subject of a decision by the Supreme Court which held no right of property was created or vested to the pensioner for this reason. Pennie v. Reis, supra; see also Stouper v. Jones, supra, 284 F.2d at 242-43; Rafferty v. United States, supra, 210 F.2d at 937; In Re Goodwin, supra, 57 F.2d at 32.

Under the cases cited supra, the states have the same general powers and discretions to condition pensions as does Congress. United States v. Hall, supra, 98 U.S. at 350, 25 L.Ed. at 182. In addition, the courts of New York have reviewed the generic challenges made by the plaintiffs here, both under the Constitution of the United States and New York State, and have similarly rejected these claims as meritless. Jones v. Valentine, 164 Misc. 443 (Sup.

Ct. Queens Co. 1937), aff'd 276 N.Y. 585 (1937); accord, Cox v. McElligott, 163 Misc. 619 (Sup. Ct. N.Y.Co.1937), aff'd 276 N.Y. 604 (1937); see also Matter of Fay v. O'Brien, 195 Misc. 865 (Sup. Ct. Queens Co. 1949), aff'd 300 N.Y. 756 (1950); Matter of Goodell v. Walsh, 185 Misc. 897 (Sup. Ct. N.Y. Co. 1945); Matter of Bachow v. Kowal, 39 Misc. 2d 439 (Sup. Ct. Erie Co. 1963).

Although these decisions of the courts of New York would have no direct bearing on the substantiality of the federal claim, they are controlling on the proper characterization of these pensions as non-vested rights. Board of Regents v. Roth, 408 U.S. 564, 577 (1974); see Koscherak v. Schmeller, 363 F. Supp. 932 (S.D.N.Y. 1973) (three-judge court), aff'd 415 U.S. 943 (1974). Plaintiffs cannot claim that these rights are vested de jure in light of these expressions of the courts of this state and they make no claims that the pensions were vested by any de facto agreement; indeed, this pension policy disallowing a double pension has been the law at least since 1940 in the State of New York, and has roots back to 1901 in New York City when it was former Section 1560 of the City Charter.

There is no claim being made to requirements for any hearing procedures. See Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970); Richardson v. Belcher, 404 U.S. 78, 80-81 (1971); Rodulfa v. United States, supra, 461 F.2d at 1257-58.

The policy of forbidding public employees a double pension, with limited exceptions, is one of long standing in federal employment [see 5 U.S.C. § 8344], in state employment [New York Civil Service Law § 150; Retirement and Social Security Law § 40(e) and

§§ 210-216], and in city employment [New York City Charter § 1117]. The policy it seems to me has been repeatedly reaffirmed and upheld as constitutional in the United States Supreme Court as well as the courts of New York State. There is no doubt, in my judgment, that the challenges made here by plaintiffs to the constitutionality of such a policy have been held devoid of merit previously, and must be considered so now.

One additional observation must be made on the alleged jurisdiction against the New York State Department of Taxation and Finance and the New York State Employees' Retirement System. While no objection is presented by the parties and although this decision dismisses the complaint against all defendants, it is, in any event, necessary to note that the New York State Department of Taxation and Finance is not a "person" subject to federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). It is also highly questionable at this stage whether either of these defendants are amenable to suit for money damages in light of the Eleventh Amendment of the United States Constitution. See Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975).

In conclusion, the motion of plaintiffs for a three-judge court is hereby denied and the motion of the defendants is granted dismissing the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Despite the realization that lessened income in these troubled days causes hardship,

Memorandum.

it is my judgment the claims made here lack sufficient merit under previous decisions of the United States Supreme Court.

It is so Ordered.

Dated: November 13, 1975

Albany, New York

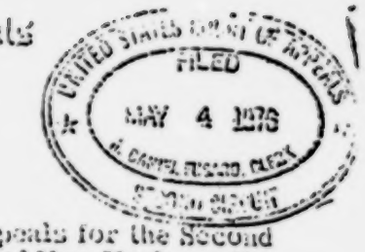
James T. Foley

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE

SECOND CIRCUIT



At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of May one thousand nine hundred and seventy-six.

Present:

WILLIAM H. MULLIGAN

THOMAS J. MESKILL

EDMUND L. PALMIERI

Circuit Judges,

GEORGE T. BRAVY, ET AL.,

Plaintiffs-Appellants,

-against-

JAMES H. TULLY, JR., ET AL.,

Defendants-Appellees.

Docket 75-7685

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern - District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below.

William H. Mulligan

Thomas J. Meskill

Edmund L. Palmieri

BEST COPY AVAILABLE

In The

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

76-150

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Petitioners,

-against-

JAMES H. TULLY, JR., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE T. BRAVY, JOSEPH ANZALONE, RAYMOND BENOIT, BERNARD BERKOWITZ, JOHN BLANDEBURGO, DAVID CAMPBELL, OTTAVIO FAZIO, HARRY FINNIGEN, ROBERT GORDON, JOHN GROGAN, JOSEPH HIGGINS, KENNETH KRAUS, JOSEPH LAMENDOLA, LOUIS LINHART, THOMAS LONGOBARDI, LEONARD MALLON, FRANCIS McCALL, DANIEL McCARTHY, WILLIAM McCARTHY, FREDERICK MOONEY, GEORGE NORTON, JOHN J. O'BRIEN, GEORGE ODONITS, VINCENT SALAMONE, DOMINICK SANSOSTI, SANTO SFOGLIANO, ERNEST SLAGUS, WALTER SLUTSKY, STANLEY STRYJEWSKI, VINCENT TUMMARELLO and EUGENE VAUGHAN,

Petitioners,

-against-

JAMES H. TULLY, JR., Commissioner, New York State Department of Taxation and Finance; NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and ARTHUR LEVITT, Comptroller, State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The Proceedings Below

Petitioners appealed to the United States Court of Appeals, Second Circuit, from an order and judgment of the United States District Court for the Northern District of New York (James T. FOLEY, D.J.), entered on November 14, 1975, which denied petitioners' motion to convene a three-judge court in this action and granted the motion by respondents to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Court of Appeals affirmed the order of the District Court on the opinion thereat.

Statement of Facts

Petitioners are all presently employed by the New York State Department of Taxation and Finance as Excise Tax Investigators, a position in the competitive class.

Prior to their present employment, petitioners were employed by the Police Department of the City of New York. They have all retired from that service, and are receiving pensions from the Police Department Pension Fund.

Each of the petitioners was, subsequent to his retirement, appointed to State service from an eligible list resulting from successful completion of a competitive examination. However, in order to permit their employment without suspension or diminution of their City pensions, they were appointed under the authority of Retirement and Social Security Law, Article 7, § 211, which relates to the re-employment of retired public employees. Because of the conditions imposed on such appointments under section 211, they are subject to review at two-year intervals.

Failure to meet the conditions imposed by section 211 on periodic review will result in the loss of section 211 status; it does not result in the termination of a person appointed thereunder, but only serves to make the appointee subject to other laws (Civil Service Law, § 150, New York City Charter, § 1117) which require the suspension of pensions upon accepting other public employment in New York State.

Petitioners are presently subject to review of their section 211 status. They complain that if they fail to meet the conditions

for continuance of that status, they will be compelled to choose between the suspension of their City pensions and the relinquishment of their State appointments.

Petitioners also complain that, as re-employed pensioners, they are precluded from acquiring membership in the New York State Employees' Retirement System by the provisions of Retirement and Social Security Law, § 40, subd. (e) and § 213. Subdivision (c) (9) of section 40 authorizes the membership of an employee retired under any other public retirement system, provided pension benefits payable under that system are suspended during his active membership in the system.

Opinion Below

The memorandum-decision and order by Hon. James T. FOLEY, Chief Judge, Northern District of New York, is set forth in the Appendix to the petition for certiorari.

The Court held, in substance, that the pensions earned by petitioners in their New York City employment had been conditioned, from the inception of such employment, by the limitations on post-retirement employment of which they now complain; that such limitations are common in public pension systems, including the Federal, and are not unreasonable.

Questions Presented

1. Do the provisions of New York Retirement and Social Security Law, § § 40 (e) and 211 through 216 inclusive, which authorize the re-employment in public service of retired public pensioners under certain conditions without suspension of their pension payments, but upon such re-employment, do not permit them to join the appropriate pension system, constitute a statutory impairment of petitioners' contractual rights?

The Courts below held that they do not.

2. Did petitioners have, at any time, a vested contractual right to re-enter public employment without suspension of their pension payments or, without suspension of payments, to rejoin the pension system?

The Courts below held that they did not.

3. Do the provisions of law aforesaid deprive petitioners of equal protection of the laws?

The Courts below held that they do not.

Reasons for Denying Certiorari

Section 1117 of the New York City Charter provides as follows:

> "§ 1117. Pensioner not to hold office. — If a person receiving a pension or a retirement allowance made up of such pension and an annuity purchased by the pensioner from the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, shall hold and receive any compensation from any office, employment or position under the state or city or any of the counties included within the city or any municipal corporation or political subdivision of the state, except the offices of inspector of election, poll clerk or ballot clerk under the election law or commissioner of deeds or notory public or jury duty, the payment of said pension only shall be suspended and forfeited during and for the time he shall hold and receive compensation from such office, position or employment; but this section shall not apply where the pension and the salary or compensation of the office, employment or position amount in the aggregate to less than one thousand eight hundred dollars annually. (Derived from former § 897 as amended by L. 1945, ch. 630, L. 1949, ch. 606, L. 1949, ch. 642, L. 1952, ch. 645.)"

Much to the same effect, but with an important exception, New York State Civil Service Law, § 150 provides:

> "§ 150. Suspension of pension and annuity during public employment
>
> "*Except as otherwise provided by sections one hundred one, two hundred eleven, and two hundred twelve of the retirement and social security law*, section five hundred three of the education law, and except as now provided by any local law or charter, if any person subsequent to his retirement from the civil service of the state or of any municipal corporation or political subdivision of the state, shall accept any office, position or employment in the civil service of the state or of any municipal corporation or political subdivision of the state to which any salary or emolument is attached, except jury duty or the office of inspector of election, poll clerk or ballot clerk under the election law, or the office of notary public or commissioner of deeds, or an elective public office, any pension or annuity awarded or allotted to him upon retirement, and payable by the state, by such municipal corporation or political subdivision, or out of any fund established by or pursuant to law, shall be suspended during such service or employment and while such person is receiving any salary or emolument therefor except reimbursement for traveling expenses." (Emphasis supplied.)

Thus, it can be seen that the City Charter requires the suspension of pension benefits payable to a City retiree who undertakes employment, for compensation in excess of $1800 per annum, with the State or any municipal corporation or political subdivision within the State, for the duration of such employment. Similarly, the Civil Service Law, § 150, requires the suspension of pension benefits to any retiree who accepts employment in any public office in the State, a municipality or a political subdivision, *except* as provided in Retirement and Social Security Law, § § 211 and 212, among others, for those who qualify and continue to qualify under those sections.

It should be obvious, therefore, that in fact the statutes which petitioners claim deprive them of their pensions actually permit them to retain such pension upon re-employment under appropriate conditions other provisions of State law and local charter to the contrary notwithstanding.

A.

Section 211 provides in substance that notwithstanding the provisions of other laws, or *of any local law or charter (e.g.*, New York City Charter § 1117) a retired person may be re-employed in the public service without diminution or suspension of his retirement allowance, under certain conditions. These conditions are:

> (1) that the annual compensation in his new position does not exceed the difference between his highest former salary and his maximum annual pension *(i.e.*, without optional modification);
>
> (2) that he is not employed in the service of his former employer, and
>
> (3) that, in the case of employment in State service, he obtain the approval of the State Civil Service Commission.

The approval of the Civil Service Commission, or other appropriate body or officer under § 211 (2)(a) may be granted only upon written request of the prospective employer which shows (a) that the employee is qualified, competent and fit, (b) that there is a need for his services, (c) that there are not readily available other persons qualified to perform the duties of the position and (d) that his employment is in the best interest of the government service.

Presumably, petitioners fulfilled all of those conditions, to the satisfaction of the Civil Service Commission, at the time of their respective appointments. Approvals given under § 211 are subject, however, to review every two years.

At the time of their respective appointments, petitioners embraced the provisions and conditions of § 211 as working to their benefit. Were it not for sections 211 and 212, petitioners could still have been employed by the State of New York but, by virtue of City Charter, § 1117 and Civil Service Law, § 150, they would have had to waive their City pensions. In short, Retirement and Social Security Law, Article 7, which petitioners now attack, did not prevent their employment by the State, but rather made it possible without loss of their pensions. Thus, petitioners' contention that sections 211, *et seq.* operate to terminate petitioners' employment and thereby deprive them of money and property without due process, is invalid on its face, and in fact, is contrary to the actual effect of those sections.

B.

Petitioners further contend that there is no legal justification for depriving them of their City pensions, in which they allege a "vested right". As demonstrated above, the suspension of petitioners' pensions upon re-employment is mandated by City Charter, § 1117 and Civil Service Law, § 150, which are not under attack in this case. In any event, those sections have been sustained against constitutional attack in an impressive array of decisions by New York State courts. These include:

Matter of Bachow v. *Kowal,* 39 N.Y. Misc 2d 439 (Sup. Ct., New York Co., 1945).

Fay v. *O'Brien,* 195 N.Y. Misc. 865, affd. 300 N.Y. 750 (1950);

(Matter of Goodell v. *Walsh,* 185 Nemfork Misc. 897 (Sup. Ct., New York Co., 1945).

Jones v. *Valentine,* 164 N.Y. Misc. 443, affd. 276 N.Y. 585 (1937);

Cox v. McElligott, 163 N.Y. Misc. 619, affd. 276 N.Y. 604 (1937);

See also, *Breithut v. Teachers' Retirement Board,* 296 N.Y. 1031 (1947);

162 A.L.R. 1469.

As the foregoing Nemfork decisions have held, "(A) municipal corporation has the right to prescribe the conditions upon which a pension shall be forfeited and its provisions are binding upon the pensioner long before his pension becomes vested" *(Matter of Fay* v. *O'Brien, supra,* 195 N.Y. Misc. at 867). Accordingly, petitioners never had a vested interest in the continuation of their pensions upon re-entry into public employment following retirement.

The benefits of public employee pensions in New York State became vested as contractual rights by virtue of Article V, § 7 of the New York State Constitution, on and after July 1, 1940. But prior to that date, such benefits were considered gratuitous, and not irrevocable *(Day* v. *Mruk,* 283 N.Y. App. Div. 233, affd. 307 N.Y. 349 (1954)). When the benefits became contractual in 1940, whatever conditions or limitations had existed in the statutory scheme on and before that date became a part of the contract thereafter *(Day* v. *Mruk, supra).* It appears that Civil Service Law § 150 (then numbered § 32) was added by Chapter 78, Laws of New York, 1932. City Charter § 1117 (formerly § 897) has been in effect since January 1, 1938 *(Breithut v. Teachers' Retirment Board, supra).* Therefore, since both of those sections ante-dated the constitutional provision vesting pension benefits, they remain as conditions on the contractual relationship *(Jones v. Valentine, supra).* In other words, the continuation of pension payments following re-entry into public employment is not a vested property right; and to the extent it is permitted by Retirement and Social Security Law, § 211, it is subject to the conditions imposed by that section.

Petitioners claim further in that they have a property right in their present State positions, of which they cannot be deprived without due process presumably, a hearing. Whether they are being deprived of State employment, or merely their pensions is

arguable. But since they accepted State employment under the conditions imposed by § 211 *et seq.*, they cannot claim an unlimited property right in those positions. In *Arnett v. Kennedy* (416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)) the Court's decision (per REHNQUIST, J.) held that an employee undertaking Federal employment under the Lloyd-LaFollette Act accepted his appointment subject to the removal provisions of the Act, and hence, had no greater rights to due process. Justice REHNQUIST also noted, in *Arnett*, the Court's "skeptical" view of a litigant challenging the constitutionality of a statute under which he has simultaneously claimed benefits, citing *Fahey v. Malonee* (332 U.S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947)).

Petitioners also attack the provisions of Retirement and Social Security Law, § § 40 (e) and 213 (a), which prohibit a retired public employee, upon re-entry into public service, from becoming a member of the State Retirement System. They overlook the provisions of § 40 (c) (9) of that law, which expressly authorizes such membership conditioned upon suspension of the pension. Once again, the condition is reasonable and justifiable, as the Courts below found.

C.

Under the statutory scheme, therefore, petitioners are not prevented from being employed by the State of New York, and are not prohibited absolutely from membership thereafter in the State Employees' Retirement System. As a consequence of such employment and membership, however, they may be virtue of *other statutes* be required to accept the suspension of their City pensions.

In addition, § § 211 and 212 actually permit re-entry into public service without loss of pension benefits, under certain circumstances, provided a need for the services is demonstrated and continues. Only in that case where such re-employment without loss of pension occurs by virtue of section 213 is there a limitation on the right to join a second retirement system.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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